No. 13566

United States
Court of Appeals
for the Ninth Circuit.

PEDRO GONZALES,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-12-52

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

GLADSTEIN, ANDERSEN & LEONARD,
LLOYD E. McMURRAY, ESQ.,
240 Montgomery Street,
San Francisco, California,

Attorneys for Appellant.

CHAUNCEY TRAMUTOLO, ESQ.,
United States Attorney,
EDGAR R. BONSALL, ESQ.,
Assistant United States Attorney,
San Francisco, California,

Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 31724

In the Matter of

The Application of PEDRO GONZALES for a Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS

Your petitioner respectfully shows:

I.

That he is a national of the United States residing in the City of Seattle, State of Washington.

II.

That he is unjustly and unlawfully detained and imprisoned by the authority of Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, in the Detention Ward at 630 Sansome Street, San Francisco, California.

III.

That the cause or pretext for such detention is a certain final order of deportation made by the Immigration and Naturalization Service of the United States ordering that your petitioner be deported to the Philippine Islands and that he be imprisoned and detained until such deportation.

IV.

That said restraint and imprisonment are illegal and in violation of the Constitution of the United

States and the amendments thereof and in violation of the statutes of the United States for the following reasons: Your petitioner was born in the Philippine Islands and at the age of seventeen, in 1930, entered the United States at the port of San Francisco, California, and has legally and lawfully resided in the United States continuously since that date. That your petitioner is therefore not subject to deportation as an alien.

V.

That this petition is made and verified on behalf of said petitioner by his attorney, Ewing Sibbett, Esq., because said attorney is informed and believes and therefore alleges that said petitioner will be placed upon a vessel of the United States for deportation to the Philippine Islands at noon today, August 5, 1952, and there is therefore not sufficient time within which to secure said petitioner's personal verification of this petition. That the facts herein set forth have been related to said attorney by said peitioner in a personal interview, and said attorney believes said facts to be true.

Wherefore, your petitioner prays that an Order to Show Cause be directed to the said Bruce Barber commanding and ordering him to show cause why a writ of habeas corpus should not be issued by this Court directed to the said Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, commanding him to produce the body of petitioner before this Honorable Court at a time and place therein to be

specified, then and there to receive and to do what this Honorable Court shall order concerning the detention and restraint of your petitioner, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid.

Dated: August 5, 1952.

/s/ PEDRO GONZALES,
Petitioner.

By /s/ EWING SIBBETT,
Attorney for Petitioner.

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Ewing Sibbett, being first duly sworn, deposes and says:

That he is the attorney for the petitioner named in the foregoing petition and has subscribed the same; that he has read the same and knows the contents thereof; that said statements made are true to said attorney's best information and belief.

/s/ EWING SIBBETT.

Subscribed and sworn to before me this 5th day of August, 1952.

[Seal] /s/ PEARL STOCKWELL,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 14, 1953.

[Endorsed]: Filed August 5, 1952.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor, and upon reading the verified petition on file herein, It Is Hereby Ordered that Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, appear before this Court on August 13, 1952, before the Honorable Michael J. Roche, Presiding Judge thereof, Post Office Building, San Francisco, California, at the hour of 10 o'clock in the forenoon of said day, then and there to show cause, if any he has, why a Writ of Habeas Corpus should not be issued herein as prayed for and that a copy of this Order be served upon the said Bruce Barber.

Dated: San Francisco, California, August 5, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed August 5, 1952.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Bruce G. Barber, District Director, United States Immigration and Naturalization Service of San Francisco, California, hereinafter referred to as "respondent," to show cause why Writ of Habeas Corpus should not be issued, admits, denies and alleges as follows:

I.

Answering paragraph I, respondent denies the allegations contained therein. Respondent affirmatively asserts that petitioner is not a national of the United States but is, in fact, an alien, a native and citizen of the Philippine Islands, and has so been adjudged and declared on May 5, 1952, by the United States District Court for the Western District of Washington, Northern Division, Civil No. 3035. Copies of the Petition for Writ of Habeas Corpus, Amended Petition, Return to Order to Show Cause, Findings of Fact, Conclusions of Law, and Judgment of the Court are contained in the certified immigration file which is attached hereto and made part of this return.

II.

Answering paragraph II, respondent denies the allegations contained therein. Respondent admits that petitioner is at present detained by him at 630 Sansome Street, San Francisco, California, but affirmatively asserts that such detention is just and lawful.

III.

Answering paragraph III, respondent admits that a final order of deportation of the petitioner to the Philippine Islands has been made, and unless such deportation is stayed by this Honorable Court, petitioner will be so deported.

IV.

Answering paragraph IV, respondent admits that petitioner was born in the Philippine Islands and

at the age of 17, in the year 1930, entered the United States at the port of San Francisco, California, and has since resided in the United States. Respondent denies the other allegations contained in paragraph IV of the complaint.

V.

Answering the allegations contained herein, respondent has no knowledge, information or belief, and therefore denies the same.

Wherefore, respondent prays that the Order to Show Cause be discharged; that each and every relief sought by petitioner be denied; and that respondent recover his proper costs herein.

Dated: August 12, 1952.

BRUCE G. BARBER,
District Director, Immigration and Naturalization Service, San Francisco, California.

By /s/ ARTHUR J. PHELAN,
Acting District Director.

[Endorsed]: Filed August 13, 1952.

[Title of District Court and Cause.]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Your petitioner respectfully shows:

I.

That he is a national of the United States and a resident of the City of Seattle, State of Washington.

II.

That he is unjustly and unlawfully detained and imprisoned by the authority of Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, in the Detention Ward at 630 Sansome Street, San Francisco, California.

III.

That the cause or pretext for such detention is a certain final order of deportation made by the Immigration and Naturalization Service of the United States ordering that your petitioner be deported to the Philippine Islands and that he be imprisoned and detained until such deportation.

IV.

That your petitioner was born in the Philippine Islands and at the age of seventeen, in 1930, entered the United States at the Port of San Francisco, California, and has since legally and lawfully resided in the United States.

V.

That in the month of May or June, 1941, your petitioner was convicted in the Superior Court of the State of California in and for the County of Alameda, of a misdemeanor, to wit: assault with a deadly weapon, and was therefore sentenced to imprisonment for the term of one year in the County jail of said Alameda County. That your petitioner served ten months of the said sentence.

VI.

That your petitioner was in 1950 convicted in the City of Seattle, State of Washington, of the crime of felony, to wit, second degree burglary, and was sentenced under the indeterminate sentence law of the State of Washington to imprisonment at Walla Walla Penitentiary for a term the minimum period of which was to be set by the Parole Board of the said State of Washington, and the maximum term of which was fifteen years. That your petitioner served approximately two years in the said penitentiary for said offense.

VII.

That prior to your petitioner's release from the penitentiary at Walla Walla, Washington, your petitioner was served with a warrant of arrest by the Immigration and Naturalization Service of the United States, alleging that he was deportable on the ground that he had been twice sentenced to a term of more than one year for the commission of crimes involving moral turpitude. That thereafter your petitioner was ordered deported on the grounds stated in said warrant. That the sentences referred to in the said warrant were the two heretofore set forth in paragraphs V and VI hereinabove.

VIII.

That the said order of deportation has become final. That your petitioner is now detained by Bruce Barber, District Director of the Immigration and Naturalization Service, pursuant to the said order for deportation. That the said restraint, imprison-

ment and threatened deportation are void and illegal and in violation of the Constitution of the United States and the amendments thereof, and in violation of the statutes of the United States governing deportation, for the following reasons:

(1) That your petitioner has not been sentenced more than once to terms of imprisonment of one year or more because of conviction in this country of crimes involving moral turpitude in accordance with the provisions of 8 USCA §165.

(2) Your petitioner was not at the time of his conviction for the crime of misdemeanor, to wit, assault with a deadly weapon in Alameda County, California, in 1941, an alien, and does not thereby come within the class of aliens deportable under the terms of 8 USCA §155, or other applicable statutes of the United States regulating the deportation of aliens.

(3) Your petitioner has heretofore presented to the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a petition for writ of habeas corpus. That the said petition was by the said District Court denied. That the petition and argument had thereon did not present to the said District Court the issues of fact and of law that your petitioner believes are controlling in this cause, more particularly, the rule obtaining in the Ninth Circuit, as set forth in the case of Del Guercio vs. Gabot, 161 Fed. 2d 559, nor the issue of sentence on two occasions by reason of convictions of crimes in-

declared on May 5, 1952, by the United States District Court for the Western District of Washington, Northern Division, Civil No. 3035. Copies of the Petition for Writ of Habeas Corpus, Amended Petition, Return to Order to Show Cause, Findings of Fact, Conclusions of Law, and Judgment of the Court are contained in the certified immigration file which was attached to respondent's return to the original Order to Show Cause.

II.

Answering Paragraph II of the Amended Petition, respondent denies the allegations contained therein. Respondent admits that petitioner is at present detained by him at 630 Sansome Street, San Francisco, California, but affirmatively asserts that such detention is just and lawful.

III.

Answering Paragraph III of the Amended Petition, respondent admits that a final order of deportation of the petitioner to the Philippine Islands has been made, and unless such deportation is stayed by this Honorable Court, petitioner will be deported. Respondent denies all other allegations contained in Paragraph III.

IV.

Answering Paragraph IV of the Amended Petition, respondent admits the allegations contained the Philippine Islands and at the age of seventeen, in the year 1930, entered the United States at the Port of San Francisco, California, and has since

resided in the United States. Respondent denies the other allegations contained in Paragraph IV.

V.

Answering Paragraph V of the Amended Petition, respondent admits the allegations contained therein.

VI.

Answering Paragraph VI of the Amended Petition, respondent admits the allegations contained therein.

VII.

Answering Paragraph VII of the Amended Petition, respondent admits the allegations contained therein.

VIII.

Answering Paragraph VIII of the Amended Petition, respondent admits that petitioner is now detained by Bruce G. Barber, District Director, United States Immigration and Naturalization Service, pursuant to an order of deportation. That petitioner heretofore presented to the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, Washington, a Petition for Writ of Habeas Corpus and that the said Petition was denied. Respondent denies all other allegations contained in Paragraph VIII. Respondent affirmatively asserts that the crimes referred to by petitioner do involve moral turpitude in accordance with the provisions of 8 U.S.C.A. 155. That petitioner, for the purposes of the Immigration Act of 1917, has been considered

an alien since the effective date of the Philippine Independence Act, to wit, May 1st, 1934. That petitioner, since the Treaty of July 4th, 1946, with the Republic of the Philippines, has been for all purposes considered as an alien and not a national of the United States. That the petitioner was found to be an alien and not a national of the United States by the District Court for the Western District of Washington, Northern Division. That the identical issue has previously been before the Court of Appeals for the Ninth Circuit, at which time the Court, in the case of Cabebe vs. Acheson, 183 F. 2d 795 at 801-802, held a Philippine in like circumstances to be an alien. That the District Court for the Western District of Washington, also held in the petitioner's case that:

> "It is immaterial that the alien held the status of a national when convicted of the first offense, where the person is an alien at the time of the institution of deportation proceedings and he has been convicted of the designated offenses, the statute is satisfied."

IX.

Answering Paragraph IX of the Amended Petition, respondent denies the allegations contained therein, in that he has no knowledge, information or belief as to the truth of such allegations.

Wherefore, respondent prays that the Order to Show Cause be discharged; that each and every re-

lief sought by petitioner be denied and that respondent recover his proper costs herein.

Dated: August 14, 1952.

BRUCE G. BARBER,
District Director, Immigration and Naturalization Service, San Francisco, California.

By /s/ A. W. HARGREAVES,
Acting District Counsel.

[Endorsed]: Filed August 14, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 31724

In the Matter of
The Application of PEDRO GONZALES for a Writ of Habeas Corpus.

JUDGMENT

The above-entitled cause coming on for hearing on the 15th day of August, 1952, at 10 o'clock a.m. before the above-entitled Court, Honorable Michael J. Roche, presiding, Lloyd E. McMurray appearing as attorney for the petitioner above named, and Chauncey Tramutolo, United States Attorney for the Northern District of California, and Edgar R. Bonsall, Assistant United States Attorney for said district appearing as attorneys for the respondent,

and the evidence having been received and the Court having fully considered the same;

Now, Therefore, It Is Ordered, Adjudged and Decreed by this Court,

That the Court finds in favor of the respondent and against the petitioner, and

That the Petition for Writ of Habeas Corpus be and the same is hereby denied, and

That the Order to Show Cause be and the same is hereby discharged.

So Ordered: August 19th, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed August 19, 1952.
Entered August 20, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

United States Court of Appeals for the Ninth Circuit [Under Rule 73 (b)]

Notice is hereby given that Pedro Gonzales, appellant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 19, 1952, and from the whole thereof.

GLADSTEIN, ANDERSEN & LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Appellant.

[Endorsed]: Filed September 15, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents are the originals filed in the above-entitled matter, and that they constitute the record on appeal as designated by the attorneys for the appellant herein:

Order to show cause.

Return to order to show cause.

Amended Petition for writ of habeas corpus.

Amended Return to order to show cause.

Judgment.

Notice of appeal.

Appellant's designation of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 3rd day of October, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Califor-

nia, do hereby certify that the foregoing documents, listed below, are the originals filed in the above-entitled matter and that they constitute a supplement to the record on appeal as designated by the Attorneys for the Appellee:

Petition for writ of habeas corpus.

Respondent's designation of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 14th day of October, 1952.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13566. United States Court of Appeals for the Ninth Circuit. Pedro Gonzales, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 3, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13566

PEDRO GONZALES,

Appellant,

vs.

BRUCE G. BARBER, etc.,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

I.

The Court below erred in denying the petition for habeas corpus and discharging the order to show cause without a hearing on the merits thereof.

II.

Appellant cannot lawfully be imprisoned or detained on the ground relied upon by respondent for the following principal reasons:

A. Appellant has not been sentenced more than once to terms of imprisonment of one year or more because of conviction in this country of crimes involving moral turpitude.

B. Appellant was not at the time of his conviction for the crime of misdemeanor in 1941 an alien, and does not by reason of the said conviction come within the class of aliens deportable under the terms of 8 USCA §155, or other applicable statutes of the United States regulating the deportation of aliens.

III.

The Court below erred in dismissing the petition and discharging the order to show cause, in that the court thereby sustained a void and illegal order of deportation which was before the court of review.

GLADSTEIN, ANDERSEN & LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Appellant.

[Endorsed]: Filed October 10, 1952.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between counsel for Appellant and counsel for Appellee that the portion of the Immigration and Naturalization Service file, Exhibit "A," referred to in Appellee's Return to Order to Show Cause need not be printed in the Transcript of the appeal herein but may be considered in its original form.

Dated: October 20, 1952.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney,
Attorney for Appellee.

By /s/ EDGAR R. BONSALL,
Assistant U. S. Attorney.

/s/ LLOYD E. McMURRAY,
Attorney for Appellant.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed October 23, 1952.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13566

PEDRO GONZALES, APPELLANT

vs.

BRUCE G. BARBER, DISTRICT DIRECTOR, ETC., APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, July 27, 1953

Before: DENMAN, *Chief Judge,* HEALY and BONE, *Circuit Judges*

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Lloyd W. McMurray, counsel for the appellant and by Mr. C. Elmer Collett, Assistant United States Attorney, counsel for the appellee, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, September 15, 1953

Before: DENMAN, *Chief Judge,* HEALY and BONE, *Circuit Judges*

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion and dissenting opinion of Bone, C. J., this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,566

September 15, 1953

PEDRO GONZALES, APPELLANT

vs.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO, CALIFORNIA, APPELLEE

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: DENMAN, *Chief Judge*, and HEALY and BONE, *Circuit Judges*

DENMAN, *Chief Judge:*

This is an appeal from a judgment of the United States District Court for the Northern District of California, denying a petition for a writ of habeas corpus to a native of the Philippine Islands held for deportation.

The questions presented are: (1) whether appellant has been twice convicted of crimes involving moral turpitude and (2) whether the lawful coming into the continental United States from its possession the Philippine Islands by a native thereof prior to the Philippine Independence Act of 1934 is an "entry" into the United States within the provisions of § 19 of the Immigration Act of 1917, formerly 8 U.S.C. § 155.

Gonzales, a native of the Philippine Islands, lawfully came into the continental United States at the age of 17 in 1930, and has since resided there. In 1941, he was charged with the crime of assault with a deadly weapon with the intent to commit murder. He was tried and convicted of the lesser crime of assault with a deadly weapon, and was sentenced to a term of one year in the Alameda County Jail, of which he served ten months. In 1950, Gonzales was convicted of the crime of second-degree burglary and was sentenced under Washington's indeterminate sentence law to the State Penitentiary at Walla Walla and there served two years.

A warrant of arrest was issued by the Immigration and Naturalization Service on October 4, 1950, charging that after his entry into the United States he had "been sentenced more than once to imprisonment for terms of one year or more because of conviction in this country of crimes involving moral turpitude, committed after entry, to-wit: Assault with a deadly weapon, and burglary in the second degree." Warrant hearing proceedings were then held at

which appellant was represented by counsel, and thereafter a warrant for the deportation was issued on July 25, 1951.

After the Order of Deportation had been issued, appellant petitioned for a writ of habeas corpus to the United States District Court for the Western District of Washington, Northern Division. The petition was denied. Thereafter, Gonzales was transferred to San Francisco to effect his deportation. There, the current petition for habeas corpus was filed and denied by the district court and this appeal followed.

Gonzales first claims that the crime of assault with a deadly weapon, of which he was convicted in the California courts, does not —under the circumstances involved—constitute a crime involving moral turpitude. He argues that the crime was only a misdemeanor inasmuch as he was not sentenced to the State Prison. See California Penal Code § 17. While this is true, it is irrelevant. The gravity of the punishment imposed upon the alien is not determinative of the question of whether the crime is one involving moral turpitude. *U. S. ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757 (Cir. 2).

Secondly, he argues that the crime is not, per se, one which involves moral turpitude. A California case is cited in which it was held that an assault with a deadly weapon was not such a crime for purposes of disbarment of an attorney. *In the Matter of Disbarment of Rothrock*, 16 Cal. 2d 449. However, there the California court was concerned with whether the crime involved such moral turpitude as to reflect upon the attorney's moral fitness to practice law, a state question. Here we are faced with the federal question of whether the crime involves such moral turpitude as to show that the alien has a criminal heart and a criminal tendency—as to show him to be a confirmed criminal. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 9. In the federal law, assault with a deadly weapon is such a crime. *U. S. ex rel, Zaffarano* v. *Corsi, supra; U. S. ex rel Mazillo* v. *Day*, 15 F. 2d 391 (S.D. N.Y.); *U. S. ex rel. Ciccerelli* v. *Curran*, 12 F. 2d 394 (Cir. 2); *Weedin* v. *Tayokichi Yamada*, 4 F. 2d 455 (Cir. 9).

Gonzales next contends that he is not within the statutory class referred to in the deportation order. He claims that he is not an alien but a national of the United States. This contention is without merit. Gonzales became an alien on July 4, 1946, upon the proclamation of Philippine Independence. *Mangaoang* v. *Boyd.* — F. 2d — (Cir. 9) [No. 13,537, June 17, 1953]; *Cabebe* v. *Acheson*, 183 F. 2d 795 (Cir. 9).

Gonzales claims that he is not within the intent of § 19 of the Immigration Act of 1917, former 8 U.S.C. § 155 (the applicable portions of which are set forth in the margin).[1] His argument

[1] § 19, Immigration Act of 1917: ". . . except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to impris-

essenitally is that he was not an alien until Philippine Independence and hence that as to acts occurring prior to the time the statute is inapplicable. Section 8(a)(1) of the Philippine Independence Act of 1934, 48 Stat. 456, 462, provides in part that: "For the purposes of the Immigration Act of 1917 . . . and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."

The District Director argues that this statute compels a conclusion that Gonzales was to be treated as an alien at the time he was convicted of assault with a deadly weapon in 1941. The Immigration Act of 1917 was one of the statutes specifically envisioned by Congress in providing that for its purposes Filipinos "shall be considered as if they were aliens." Since both convictions occurred after the effective date of the Philippine Independence Act of 1934, Gonzales is properly subject to deportation under § 19 of the Immigration Act of 1917 if he is otherwise subject to its terms.

Gonzales contends that he is not otherwise subject to the terms of that statute, because when he came into the United States in 1930, he did not make the "entry" required by § 19 of the Immigration Act of 1917 cited *supra*. This contention is meritorious. In *Mangaoang* v. *Boyd*, *supra*, it was stated, one judge reserving judgment, that a Filipino who came into the United States prior to the Philippine Independence Act had not technically "entered" the United States and hence that Section 22 of the Internal Security Act of 1950 (providing that aliens who, at the time of entering the United States or at any time thereafter, are members of the Communist Party of the United States, shall be deported) was inapplicable. Here we are dealing with the portion of Section 19 of the Immigration Act of 1917 concerning convictions for two crimes involving moral turpitude "committed at any time after entry." The question then is whether Gonzales had made an "entry" as that word is used in the clause last quoted.

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onment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, *committed within five years after the entry of the alien to the United States*, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed *at any time after entry;* . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . The provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States; and shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof." (Emphasis supplied.)

In *U. S. ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425, "entry" was defined as including "any coming of an alien from a foreign country into the United States." This definition was followed in subsequent cases, *Delgadillo* v. *Carmichael*, 332 U.S. 338; *U. S. ex rel. Schlimmgen* v. *Jordan*, 164 F. 2d 633 (Cir. 7), and has been adopted by the Immigration and Nationality Act of 1952, § 101(a)(13).[2] At the time Gonzales arrived in this country in 1930, he was not an *alien* and hence not covered though coming from a foreign country or outlying possession, but was a United States *national* coming from an outlying possession. There has been no "entry" by an alien, and hence there have not been two crimes involving moral turpitude "committed at any time after entry." It follows that Gonzales is not subject to deportation under Section 19 of the Immigration Act of 1917.

We recognized the fact that this definition of the word "entry" is not its plain and obvious meaning, but we also recognize that the word has become a word of art. While it is true that the ultimate holdings in *Volpe* v. *Smith*, *supra*, and *U. S. ex rel. Schlimmgen* v. *Jordan*, *supra*, were that the coming of an alien into the United States for the second time was an "entry," we do not rely upon the holding of these cases but merely cite them as showing the narrow meaning which has been ascribed to the word.

To the contention that the holdings in *Delgadillo* v. *Carmichael*, *supra*, and *Di Pasquale* v. *Karnuth*, 158 F. 2d 878 (Cir. 2), were necessary to avoid an obvious injustice and hence do not support our position, it should be noted that not all judges agree on what is an "obvious injustice"; in fact this court did not see the obvious injustice in the *Delgadillo* case, *Del Guercio* v. *Delgadillo*, 159 F. 2d 130 (Cir. 9). No appellate case has been found which ascribes any other meaning to the term "entry" than that used here. The meaning of a term used in a statute cannot mean one thing for one situation and something else for a different situation else the law would not have that reasonable certainty which the people have a right to expect.

The definition of entry set out in § 101(a)(13) of the Immigration and Nationality Act of 1952 is not cited because we think it controlling in this case, but only because it shows that Congress, in revising the immigration and nationality laws, recognized what we hold to be the judicial meaning of the term in relation to immigration and nationality statutes.

For the contention that we should give the plain and ordinary

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[2] Immigration and Nationality Act of 1952, Sec. 101(a)(13):

"(13) The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, . . ."

meaning of the word entry is quoted a passage written by Justice Rutledge speaking for a majority of the Supreme Court in a case involving a *criminal* statute, *United States* v. *Brown*, 333 U.S. 18, 25, 26. We prefer to rely upon the statement of Justice Douglas made on the same day the *Brown* case was decided speaking for a unanimous court in a *civil* case involving Section 19 of the Immigration Act of 1917, in which this court was reversed for giving a broad construction of the very statute with which we are here concerned. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo* v. *Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

The word entry has been here given the narrow meaning which has been ascribed to it in many cases. See *Mangaoang* v. *Boyd*, — F. 2d —, — (Cir. 9) [No. 13,537, June 17, 1953] and the cases cited in footnote 5.

The judgment of the district court is reversed and the cause remanded with instructions to issue the writ and to order Gonzales' discharge.

BONE, *Circuit Judge*, Dissenting:

I dissent.

The majority correctly holds that Gonzales has twice been convicted in this country of crimes involving moral turpitude within the meaning of § 19 of the Immigration Act of 1917, (formerly 8 U.S.C.A. Sec. 155). From the record before us it is clear that appellant came to the United States in 1930 and has since resided continuously therein. He is an alien and is subject to the provisions of Section 155, *supra;* an order for his deportation has been issued on the ground that he has been convicted and sentenced for the offenses above mentioned. Therefore he is deportable.

When Gonzales came to the United States he quite obviously made an "entry" into this country in the usual and accepted sense of that term. And generally the plain and obvious meaning of a statute is preferred to a curious, hidden signification. *Payne* v. *Ostrus*, 8 Cir., 50 F. 2d 1039; *United States* v. *Missouri Pacific Ry. Co.*, 8 Cir., 213 Fed. 169. The majority, however, attaches to the

word "entry" in the applicable expulsion statute a meaning which is certainly curious and very well hidden. The word, they say, means entry by aliens and by no other class of persons. It is urged that since at the time of his coming to the United States Gonzales was *a national* and beyond the reach of *all laws relating to aliens*, he did not make an "entry" and therefore is not deportable.

I reserved judgment when the same proposition was expressed by the majority in *Mangaoang* v. *Boyd*, 9 Cir., — F. 2d — (decided June 17, 1953). The decision in that case was supportable upon another ground. After considering argument of the same question here, I cannot accept the view now advanced by the majority.

Ordinarily when a court declines to apply a statute according to the plain meaning of its terms it is for one or more of the following reasons: (1) the statute itself clearly indicates that the words are used in a special, technical sense; (2) the words have an established judicial meaning in the field of law in which the statute is to operate; (3) to give the words of the statute their plain meaning would be inconsistent with the object and purpose of the statute as a whole; (4) to apply the statute according to its terms would be to attribute to Congress a capricious purpose and lead to an unconscionable result.

First. The majority do not, and they could not, justify their "highly technical" construction of the word "entry" by an analysis of the statute itself. Section 19 of the Immigration Act of 1917, quoted in footnote 1 of the majority opinion, provides in pertinent part for deportation of aliens upon their conviction of certain crimes committed "at any time after entry." I see nothing in this language that induces the conclusion that the person involved must have been an alien at the time of his coming into the United States in order to be deportable.[1]

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[1] The case of *Eichenlaub* v. *Shaughnessy*, 338 U.S. 521, is helpful here. The question in that case was whether the person sought to be deported must have been an alien at the time of his conviction of a violation of the Espionage Act of 1917 in order to be deportable. The applicable expulsion provision made deportable "aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate" the Espionage Act of 1917. The Supreme Court held an alien deportable under that provision although at the time of his conviction of espionage he was a naturalized citizen of the United States, saying, "* * * the Act does not require that the offenders reached by it must have had the status of aliens at the time they were convicted." 33 U.S. at 530.

In light of that decision, I do not see how it can be seriously contended that the language of § 19 of the Immigration Act of 1917, standing alone, requires that the person involved must have been

Second. The majority rely upon certain decisions of the courts as establishing that the term "entry" is and must be regarded as a word of art.

Aside from the majority holding in our *Mangaoang* case, *supra*, to that effect, the cases do not support application of this "word of art" doctrine except under such exceptional circumstances as were present in the cases of *Delgadillo* v. *Carmichael*, 332 U.S. 388, and *Di Pasquale* v. *Karnuth*, 2 Cir., 158 F. 2d 878. In those cases it was held that when an alien's departure to a foreign place was *not intended or voluntary* his return was not an "entry" within the meaning of a statute subjecting aliens to deportation for crimes committed "within five years after entry." in the *Di Pasquale* case the critical "entry" occurred when the alien, while asleep in a railroad sleeping car, was transported into Canada and back into the United States by the route of a passenger train on a journey from Buffalo to Detroit. In the *Delgadillo* case the "entry" occurred when the alien, a member of the crew of an American vessel, was plunged into the sea as a result of the torpedoing of his ship, then rescued and taken care of in Cuba for a short time before returning to the United States. In each case, but for the fortuitous departure and "re-entry", the alien would not have been subject to deportation. In both cases the courts, with good reason, concluded that it would be a capricious and unconscionable application of the statute to hold the alien deportable under these extraordinary circumstances. By way of elaboration we might well quote the Supreme Court in the *Delgadillo case*, 332 U.S. at 391, where it is said: "We might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory 'entry' on his voluntary return. Respect for law does not thrive on captious interpretations." This illustrates how the Supreme Court met exceptional circumstances by applying exceptional treatment to avoid an obvious injustice.

The majority also relies upon *Volpe* v. *Smith*, 289 U.S. 422, and *United States ex rel. Schlimmgen* v. *Jordan*, 7 Cir., 164 F. 2d 633. In those cases it was held that the coming of an alien into the United States for the second time is an "entry" within the meaning of a statute subjecting aliens to deportation for crimes committed "prior to entry." Why these two cases are thought to support the

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an alien at the time of his coming into the United States, as a condition precedent to his deportation. The argument for *the requirement* of simultaneous alienage and conviction under a statute making deportable "aliens who * * * have been or may hereafter be convicted * * *" (as in the *Eichenlaub* case), would appear to be even stronger than the argument (here accepted by the majority) for requiring simultaneous alienage and "entry" under a statute making the alien deportable upon conviction of certain crimes if committed "at any time after entry."

majority view on the "entry" question here is not clear to me. My bewilderment increases when I read the language of the Supreme Court in support of its holding in the *Volpe* case: "An examination of the Immigration Act of 1917, we think, *reveals nothing sufficient to indicate that Congress did not intend the word 'entry' in § 19 should have its ordinary meaning.*" (Emphasis mine.) 289 U.S. at 425.

These four cases do not support the majority holding. Nothing can be worked out *arguendo* from them which might bear on the question whether the coming of a *national* into the United States is an "entry" within the meaning of § 19 of the Immigration Act of 1917. The majority's reliance upon language in the *Volpe*, *Delgadilla* and *Schlimmgen* cases that an "entry" is "any coming of an alien from a foreign country into the United States" is a glaring example of reading language out of context. For in those cases the persons involved were, and always had been, aliens. The courts were therefore not concerned with making *a distinction* between entry by aliens and entry by any other class of persons nor did they purport to make such distinction. The language used had reference only to the very different questions involved in those cases.

In the *Mangaoang* case, though not in the instant case, the majority cited *Del Guercio* v. *Gabot*, 9 Cir., 161 F. 2d 559. As will be pointed out shortly, this court did not in that case make any attempt to define the word "entry." The majority's interpretation of the word "entry," I submit, has no judicial precedent to support it.[2]

Third. If the word "entry" were given its plain and obvious meaning, would the result here be inconsistent with the object and purpose of the expulsion provisions of the Immigration Act of 1917 considered as a whole?

It is obviously futile to search for a Congressional purpose concerning the deportability of Filipinos in an Act pertaining to

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[2] Even if it be assumed that the definition of "entry" set out in § 101(a)(13) of the Immigration and Nationality Act of 1952, quoted in footnote 2 of the majority opinion, is in line with the definition given that word by the majority here, that Act is not applicable to this case. And I note in passing that an interesting question might arise under that Act, in view of § 326 thereof, which provides:

"Sec. 326. Any person who (1) was a citizen of the Commonwealth of the Philippines on July 2, 1946, (2) *entered* the United States *prior* to May 1, 1934, and (3) has, since such *entry*, resided continuously in the United States shall be regarded as having been lawfully admitted to the United States for permanent residence for the purpose of petitioning for naturalization under this title." (Emphasis mine.)

aliens passed at a time when Filipinos were nationals of the United States and long before they were made subject to its terms. But evidence of Congressional purpose in this regard may be found elsewhere. From the time of the passage of the Philippine Independence Act of 1934 (48 Stat. 456, *et seq.*) until the Proclamation of Philippine Independence on July 4, 1946, the Independence Act controlled the *status* of citizens of the Philippines in the United States. If by that Act Filipinos such as Gonzales (who entered the United States prior to its passage) were made subject to the alien deportation statues, it could hardly be contended that somehow and in some undisclosed manner they obtained complete immunity from deportation when the Independence Act became obsolete and Filipinos became aliens by the Proclamation of Philippine Independence in 1946.

Section 8 of the Philippine Independence Act provided in pertinent part that "For the purposes of the Immigration Act of 1917 * * * and all other laws relating to the * * * expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."

Under the majority opinion an exception must be read into this provision. Insofar as the liability of Filipinos to expulsion is concerned, the majority would say that the Independence Act did not apply to those who on its effective date were *residents* of the United States. For these Filipinos, they say, made no "entry" into the United States and are therefore not subject to deportation.[3]

I cannot accept this view. The Independence Act did not distinguish between resident and non-resident Filipinos. And as has been pointed out, no court prior to the very recent *Mangaoang* case had ever held or even inferred that the word "entry" in the expulsion statutes meant entry by an alien only. If we today give the word this peculiar and highly technical construction and conclude therefrom that Congress meant to except resident Filipinos when it made Philippine citizens "aliens" *for the purposes of the expulsion statutes*, we attribute a remarkable subtlety of expression to that legislative body. It seems incredible to me that Congress meant to exclude the great body of Filipinos residing in the United States in 1934 from the sweep of § 8 of the Independence Act when it did not do so in express terms.

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[3] Under the majority opinion it may be that those Filipinos who at the time of the passage of the Independence Act resided in the United States and who subsequently departed to a foreign place and then returned (i.e., made an "entry") would be subject to the alien deportation statutes. But this is the only foreseeable instance in which Filipinos residing in the United States in 1934 might be subject to deportation under the majority's holding.

I think the Independence Act meant exactly what it said; that by that Act Filipinos not citizens of the United States were made subject to the expulsion provisions of our immigration acts. The language included both resident and non-resident Filipinos. This being so, Gonzales became subject to the expulsion statutes upon passage of the Independence Act and remained so subject when he became an alien by the Proclamation of Philippine Independence in 1946. From the available evidence on the subject, I conclude that the majority's strained construction of § 19 of the Immigration Act flies in the face of a clear congressional purpose.

Despite the statements in the majority opinion in the *Mangaoang* case, *Del Guercio* v. *Gabot*, *supra*, is not opposed to the view here expressed. In that case this court held (1) that where a Filipino was sought to be deported under so much of § 19 of the Immigration Act of 1917 as provided for expulsion upon conviction of crimes committed "within five years after entry," the entry was an essential element of the deportable conduct; and (2) the Independence Act would therefore not be retroactively applied to stamp the coming of the Filipino into the United States an "entry" within the meaning of the deportation provision.

The opinion in that case will be searched in vain for any statement that the word "entry" means the coming of an *alien only* into the United States. Had that been the view of this Court, the question there involved could have been speedily decided upon that ground. The decision rested upon a more solid basis. The Independence Act was by its terms prospective in operation. The applicable expulsion provision made an alien deportable for a crime *only* if the crime was committed within five years after entry. The specific time relationship between the "entry" and the commission of the crime was made vital. With good reason, therefore, this Court considered the "entry" an essential element of the deportable conduct, and refused to retroactively apply the Independence Act so as to stamp the coming of the Filipino prior to its passage an "entry" within the meaning of the expulsion provision.

The *Del Guercio* case immunized from deportation only those Filipinos who came to the United States within five years prior to the Independence Act and committed a deportable offense after the passage of the Act and within five years after entry. It did not, as did the *Mangaoang* case and the instant case, give Filipinos residing in the United States at the time of the passage of the Independence Act a blanket immunity.

The distinction between the *Del Gueirco* case and the instant case is clear. Under that portion of § 19 of the Immigration Act of 1917 here applicable, an alien is deportable upon conviction of two crimes of a described class if committed "at any time after entry." In such case the "entry" is not, in any real sense, an element of the deport-

able conduct, any more than is the birth of an accused an element of the crime with which he is charged. The application of the expulsion statute to Gonzales involves no retroactive application of the Independence Act. It does not make the Independence Act reach back to stamp acts of Gonzales prior to its passage "elements" of the conduct for which he has been ordered deported.

Fourth. There might be some justification for the majority's disposition of this case if to uphold the order of deportation would be to attribute to Congress an unconscionable purpose. But in this case we have an alien who since being subjected to the alien expulsion statutes has been twice convicted of serious crimes involving moral turpitude. Permitting the order of deportation to stand could scarcely be said to be more harsh than was the result in the *Volpe* or *Eichenlaub* cases, *supra*, where the Supreme Court did not permit any squeamishness to deter it from applying the expulsion statutes according to their terms.

Certainly deportation may be punishment but the rule of strict construction is not a license to courts to create ambiguity where there is none, to proceed with indifference to a statute to reach a result which the court might think desirable. As was said by Justice Rutledge, speaking for the Supreme Court in *United States* v. *Brown*, 333 U.S. 18, 25, 26:

> "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U.S. 527, 530, the canon 'does not require distortion or nullification of the evident meaning and purpose of the legislation.' Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."

The judgment of the lower court should be affirmed.

(Endorsed:) Opinion and Dissenting Opinion. Filed Sep. 15, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13566

PEDRO GONZALES, APPELLANT

vs.

BRUCE G. BARBER, ETC., APPELLEE

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with instructions to issue the writ and to order Gonzales' discharge.

(Endorsed:) Filed September 15, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13566

PEDRO GONZALES, APPELLANT

vs.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO, CALIFORNIA, APPELLEE

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-nine (39) pages, numbered from and including 1 to and including 39, to be a full, true and correct copy of the entire record of the above-entitled case, together with original exhibits transmitted herewith, in the said Court of Appeals, made pursuant to request of Honorable Robert L. Stern, Acting Solicitor General of the United States, coun-

sel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 2nd day of October, 1953.

[SEAL.] (S.) PAUL P. O'BRIEN,
Clerk.

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SUPREME COURT OF THE UNITED STATES

No. 431, October Term, 1953

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO, CALIFORNIA, PETITIONER

vs.

PEDRO GONZALES

Order allowing certiorari. Filed December 14, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.